BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	

COMMENTS OF SPRINT CORPORATION

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SUMMARY

Sprint fully supports the Commission's objectives in this proceeding: Regulation of VoIP services under Title II should be minimal. The FCC can and should use its forbearance authority under Section 10 to minimize regulation of VoIP services. Absent market power, traditional retail regulatory conventions are costly and inappropriate. Nevertheless, there is a need for a clear, legally sustainable regulatory framework. Sprint proposes to define VoIP as the provision of services that: 1) provide real-time, two-way voice; 2) are offered directly to the public for a fee; and 3) use the telephone number system of the North American Numbering Plan. These services are direct substitutes for traditional circuit-switched and packet-switched wireline voice services, and thus implicate the framework now in place for the provision of voice communications.

There are certain legislative and social goals which must apply to VoIP services. First, VoIP providers must have interconnection rights and access to UNEs and telephone numbers. These are fundamental assets for facilities-based VoIP. Second, VoIP providers must share in the universal service, disabled access and 911 service obligations as all other voice providers are required to do. If there are significant shifts of TDM traffic to IP traffic, as predicted by the *NPRM*, Congress' objectives to provide universal service to all consumers, including the disabled, and the social goal of providing quick access to public safety would be thwarted as the number of consumers using VoIP increases. Third, the FCC's current access regime and its subsequent reforms should apply to VoIP providers. Thus, under the current regime, a VoIP provider using the facilities of another provider to originate or terminate traffic should be required to compensate that carrier (and vice versa where a VoIP provider is facilities-based).

Sprint believes that these goals are best achieved if VoIP is correctly classified as a "telecommunications service." Some VoIP calls involve no net protocol conversion; for these services, the correct regulatory classification is clear. But even where net protocol conversion occurs, both the Act and the Commission's precedent indicate that VoIP services should be treated as "telecommunications" and/or "telecommunications services."

Finally, the classification of VoIP services as information services could impair the FCC's ability to ensure the universal availability of voice services. Title I ancillary jurisdiction is insufficient to compel information service providers to support critical congressional goals. Classifying VoIP services as information services is likely to lead to even greater legal (and market) uncertainties, defeating the very purpose of this proceeding.

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Sprint Corporation ("Sprint"), by its attorneys, hereby submits its comments in the above-captioned rulemaking.[1] The *NPRM* examines the issues relating to all IP-enabled services.[2] The internet protocol over packet switched transmission promises significant advancements, including the ability to deliver services with more efficient use of bandwidth at lower costs. As with other technological advances throughout the last century, policymakers must consider how to address the changes these advances produce. From a public policy perspective, the need to address the implications for traditional voice service is critical and urgent. Sprint's comments are therefore limited to Voice over Internet Protocol ("VoIP") services as defined herein.[3]

Sprint believes that two main drivers exist for this proceeding. First, it is evident that VoIP services can and are being offered competitively, making most of the traditional regulatory conventions unnecessary and inefficient. Second, VoIP can be expected to have a significant, indeed perhaps tectonic, impact on the traditional voice market. These basic facts (neither of

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1 *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*NPRM*").

2 *Id.* ¶ 2.

3 Section III, *infra*. Sprint's comments do not address IP-based services that may provide enhanced service offerings in conjunction with two-way voice traffic.

which is controversial) confirm the Commission's judgment to apply regulation only where it is necessary and appropriate. They also confirm that VoIP, as a fully substitutable service for traditional wireline voice services, necessarily implicates fundamental policy objectives set forth by Congress in the Communications Act. The FCC thus should adopt a minimal regulatory framework for VoIP that promotes the social and economic goals of preserving universally available voice services on reasonable terms and conditions. Specifically, the FCC should:

- Reject conventional regulation of competitive VoIP providers;
- Require that VoIP service providers compensate others for the use of their networks;
- Ensure that VoIP providers have interconnection rights and access to UNEs and telephone numbers; and
- Require VoIP to share in the universal service, disabled access and 911 service obligations as all other voice providers are required to do.

In order to achieve these goals, the Commission should declare that VoIP services are telecommunications services. The suggestion to classify VoIP as an information service, no doubt intended to safeguard VoIP from unnecessary regulation, may very likely preclude the Commission's ability to do precisely that.

I. INTRODUCTION

VoIP is the latest innovation in the evolution of voice service. VoIP services (as defined here) are functionally indistinguishable from circuit-switched, packet-switched or other wireline voice services. They all offer real-time voice capabilities using transmission facilities. They all address the same consumer demand for interconnected voice telephone service. VoIP offers suppliers the opportunity to meet this demand at lower costs, and potentially with greater features. For present purposes, however, the principal difference of significance from both

supplier and consumer perspectives lies in the uncertain regulatory distinctions that need to be resolved in this proceeding.

Sprint supports the *NPRM*'s proposed policy to subject VoIP services to regulation only where there is a need to do so. Full traditional regulation is generally unnecessary and costly. The Commission already has in place the policy analysis for determining when regulation should be imposed and to what extent. Using that analysis, the Commission should eschew most economic regulation of VoIP services (except in the presence of market power) and apply only limited regulations where necessary to promote Congress' social objectives and to ensure reasonable compensation to other carriers for the use of their networks.

VoIP does not enter the market with a *tabula rasa*. There is a history of complex and extensive regulatory mechanisms that have governed the provision of wireline voice services, some constructed by the FCC, others by statute. VoIP, if treated without reference to this framework, threatens to undermine the public policy goals that the current arrangements are meant to address. Universal service funding, for example, cannot be achieved if certain providers of fully substitutable services are completely excluded from the system. Consumers cannot be protected from supracompetitive rates or inadequate access to critical services if a provider with market power can evade regulation simply by switching technologies. Companies cannot maintain their networks and efficiently exchange traffic with other voice providers if they are not adequately and equitably compensated for use of their networks.

From the perspective of dynamic efficiency, disparate regulatory treatment of fully substitutable services based solely on the choice of technology inevitably skews market outcomes. The failure to establish a reliable and stable set of policies can have equally disruptive effects. It is unclear (and may be unknowable) the extent to which investment

decisions may have already been manipulated by the current regulatory uncertainty. Investment in VoIP itself may be greater than it otherwise would be absent the opportunities for regulatory arbitrage. Or VoIP investment may be less than it would be if certainty and stability had been established earlier.

VoIP will bring about significant changes for telecommunications; it is a disruptive technology like analog-to-digital data, like wireline-to-wireless, like coaxial cable-to-fiber. But this does not make phone service a "free" good. It still requires transmission and packet switches. It still makes use of the extensive national investment in the physical layer of network infrastructure.

The regulatory history of mobile services provides a useful model here. The FCC at one time segregated competing mobile services across artificial categories, with the negative effect of imposing significant output restrictions. Access to public resources was also disparate, with spectrum licensing confining the growth of certain classes of mobile service providers. In 1993, Congress remedied these problems by declaring that all commercial providers offering competing mobile services should be treated equally and indeed, should be left largely unregulated by both the FCC and the states. At the same time, Congress and the FCC have included these providers in the larger telecommunications framework where appropriate, for example, by requiring payment for access to other carrier networks, provision of 911 services, and support for disabled access and universal service goals.

II. VoIP SERVICES SHOULD BE SUBJECT TO MINIMAL REGULATION.

VoIP service, as another means of delivering voice service, should be subject to the same principles that have governed the FCC's choices to regulate for the past three decades. Where a provider's pricing is disciplined by market mechanisms, there is simply no need for most

economic regulation. Moreover, such regulation is costly to taxpayers, to providers and to economic efficiency. Unless a provider enjoys market power, and thus absent regulation could raise prices above costs, the costs associated with rate regulation should be avoided. Because incumbent local exchange carriers tend to enjoy market power over voice services, their decision to utilize a different means of delivery (that is, from circuit-switched to internet protocol) does not in and of itself alter that market position.[4]

In the case of VoIP services delivered through internet access over last-mile broadband facilities, a growing number of companies have entered the market and the competitive nature of that market is uncontested. There is simply no need for conventional public utility regulation in such a marketplace. This current situation contrasts radically with a possible future scenario wherein a rapid transition to phone-to-phone VoIP by incumbent LECs makes no perceptible change in the market dynamics for local voice service. Minimal regulation of VoIP will stimulate competitive entry and facilitate an environment in which competition can eliminate the need for any retail level regulation of any provider, including the ILECs.

For competitive providers, Section 10 not only provides the authority for the FCC to forbear, it *requires* agency forbearance when the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

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[4] Competitive inroads may continue to erode this market power to the point where regulation is unnecessary.

(3) forbearance from applying such provision or regulation is consistent with the public interest.[5]

As the Commission has previously found, regulation of competitive telecommunications service providers "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[6] Thus, rates and other terms and conditions of service offered by firms without market power are no longer regulated; indeed the filing of tariffs by these firms is prohibited. 47 C.F.R. § 61.19. Both consumer interest and the public interest are served by forbearance.

Similarly, the Commission has declined to regulate competitive entry pursuant to Section 214. 47 C.F.R. § 63.01(a). Again, Section 10's standards are easily met here for VoIP as well. Section 214 was designed largely to regulate against imprudent investments by monopoly providers. Where competitive firms make poor investment decisions, their shareholders -- not customers -- must bear the consequences. And reducing legal entry barriers is plainly in the public interest.[7]

At a minimum, then, the Commission should ensure that VoIP providers are not subject to any Title II regulation from which other competitive voice service providers are exempt.

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5 Section 10(a), 47 U.S.C. § 160(a).

6 *Id.* *See generally Domestic Detariffing Order*, 11 FCC Rcd 20730 (1996); *Order on Reconsideration*, 12 FCC Rcd 15014 (1997); *Second Order on Reconsideration and Erratum*, 14 FCC Rcd 6004 (1999), *aff'd*, *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

7 The Commission has maintained certain aspects of Section 214 with respect to international services in order to safeguard against the exercise of market power by foreign correspondents.

VoIP providers, properly classified as providers of competitive telecommunications services, will benefit from prior FCC forbearance rulings without the need to make new Section 10 findings. Thus, they will be free from price, entry and additional statutory requirements such as Section 211 (intercarrier contracts) and Section 212 (interlocking directorates). Further, the development of VoIP may itself warrant Section 10 review of regulations that are currently applied to other service providers.

Sprint further agrees with the *NPRM* in that sound public policy should seek to avoid saddling national or regional providers with a variety of costly regulations unique to each state.[8] In addition to the direct costs upon service providers, some state rules may dictate inefficient price structures, and thereby distort national outcomes. Sprint fully supports the Commission's efforts to minimize these costs.

III. VoIP SERVICES THAT ARE OFFERED AND FUNCTION AS SUBSTITUTES FOR TDM VOICE CALLS ARE TELECOMMUNICATIONS SERVICES.

Various forms of VoIP services currently are available to consumers. *See NPRM* ¶¶ 12-22. Sprint supports the *NPRM*'s proposal to preserve the outcomes of the Commission's decisions in *pulver.com* and the *AT&T Declaratory Ruling*. In defining the "middle ground," the FCC should define VoIP service as a "telecommunications service" if the service has the following characteristics:

- is offered for a fee directly to the public;
- provides the delivery of real-time, two-way voice calls; and

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[8] In the case of Section 332 services, of course, Congress has explicitly declared this to be national policy.

- uses telephone numbers covered by the North American Numbering Plan in some form (whether or not those numbers are "dialed" by the end user) to place or receive communications.

VoIP services that meet the characteristics described above constitute basic voice services that are subject to FCC regulation as Title II common carrier services. As the FCC has previously observed, "the classification of a service under the 1996 Act depends on the functional nature of the end-user offering." *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, ¶ 86 (1998) ("*Universal Service Report to Congress*").

VoIP services, as defined above, are substitutes for traditional circuit-switched and packet-switched voice services. As the functional equivalents to fixed voice service, these services should be analyzed and regulated -- or not regulated -- within the same general regulatory framework as their competitors.

A. The Services Provided, Not the Technology Used to Provide the Service, Should Drive the FCC's Regulatory Scheme.

Because Congress has empowered the FCC with the authority to forbear, there is no policy basis or legal analysis that would allow misclassification of these services. The history of communications in the United States is characterized by evolutionary changes in the technology over which traditional or new services are provided. VoIP is an innovation in the provision of voice telephony; it is not a new kind of service. The method of delivering a transmission service, most especially voice, cannot alter the jurisdictional nature of the service to consumers. At least until now, there has never been a question of whether a new technology over which the service was being provided would somehow transmogrify voice service into an ancillary service only tangentially within the FCC's jurisdiction.

The FCC's history of addressing new transmission technologies used to provide conventional services confirms this. When the first fiber optic line was built to provide voice

and data communications services, there was no question that the fiber and the digital signals transmitted over it by the Bell System would be regulated under Title II.[9] Transmission services provided over the first domestic satellites were welcomed as regulated transmission services.[10] And packet switching used to provide basic data transmission did not alter the "basic" nature of the service. Similarly, for VoIP services, the modality used to deliver conventional voice service should not dictate the FCC's regulation. Rather, regulation should be based on the economic circumstances and essential nature of the service offered.

The history of economic regulation informs us why regulation must not favor one competing technology over another. The misfortunate consequences of ICC regulation of trucks, ships and trains,[11] along with this agency's own misguided history of the early regulation of cable television, are not so distant or removed from this proceeding.[12] Regulatory schemes that arbitrarily impose varying costs on services competing directly with one another damage allocative and economic efficiency.

Central to the enactment of the 1996 Act was Congress' intent to ensure increasing development of competitive modalities. Congress "made clear that the 1996 Act is

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9 *See generally AT&T Co., The Bell Telephone Co. of Pa., The C & P Tele. Co., et al.*, Memorandum Opinion Order & Authorization, 84 FCC 2d 303 (1981).

10 *See Domestic Communications-Satellite Facilities*, Report and Order, 22 FCC 2d 86, ¶ 17a (1970); *Domestic Communications-Satellite Facilities*, Second Report and Order, 35 FCC 2d 844, ¶¶ 31-32 (1972).

11 *See Interstate Commerce Commission v. New York, New Haven & Hartford Railroad*, 372 U.S. 744, 757-8 n.11 (1963) (noting that Congress' reforms were designed to eliminate the ICC's role as "the great handicapper" of transportation modalities).

12 *See, e.g.*, *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, Report, 71 FCC 2d 632 (1979).

technologically neutral and is designed to ensure competition in all telecommunications markets."[13] Discriminatory regulatory treatment based upon the accident of technology displaces consumer choice and market outcomes with governmental bias.

Consistent with the 1996 Act's mandate, the FCC has refused to dictate technology choices. *See, e.g.*, *Amendment of Part 15 of the Rules and Regulations with Regards to All-Channel Television Broadcast Receivers* (requiring the "same type of basic mechanism be used for tuning VHF and UHF channels");[14] *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems* (redefining cable television system to promote technological neutrality with respect to permissible types of cable signal carriage).[15] The FCC also has adhered to the policy in the context of spectrum sharing in the Ka-band, explaining that one of its "objectives in

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13 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, ¶ 2 (1999) ("*Advanced Services Order on Remand*").

14 *Amendment of Part 15 of the Rules and Regulations with Regards to All-Channel Television Broadcast Receivers*, Report and Order, 21 FCC 2d 245, ¶ 26 (1970). In mandating that "VHF and UHF tuning mechanisms and tuning aids… be of comparable capability and quality," the FCC avoided endorsing one type of television station over another. *Id.* ¶ 28.

15 *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, First Report and Order, 63 FCC 2d 956, ¶ 19 (1977). The altered definition's "neutrality respecting technical configuration" allowed cable systems operators flexibility to design systems "best suited to the needs of subscribers in a given area while permitting [the Commission] the latitude to fashion… [its] Rules to apply to any current or future type of cable television system." *Id.*

choosing among the proposed [spectrum] sharing options [was] to choose a technologically neutral option."[16]

The problems inherent in the government explicitly picking winners also occur when the government implicitly "picks" by arbitrarily applying uneven regulatory treatment. Competitors offering services with high cross-elasticities should have access to the same regulatory benefits and bear the same regulatory costs whether they use the same or varying technologies. In the *Universal Service Report and Order*, the FCC adopted the Joint Board's technology-neutral proposals concerning contributions to and distributions of low-income support,[17] endorsement of various modes of delivering services[18] and support of access and local usage costs for wireline- and wireless-based providers.[19] For the last 35 years, the Commission has consistently eschewed disparate regulation where no rational basis exists for disparity. *See, e.g., North Atlantic Facilities Planning*, Report and Order, 3 FCC Rcd 3979, ¶ 74 (1988) (promoting intermodal competition between international satellites and undersea cables).

Following the tenets of the 1996 Act and long-standing precedent, the FCC should continue to adhere to a policy of technological and competitive neutrality. Successful

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16 *Establishment of Policies and Service Rules for the Non-Geostationary Satellite Orbit, Fixed Satellite Service in the Ka-Band*, Report and Order, 18 FCC Rcd 14708, ¶ 18 (2003).

17 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 27 (1997) ("*Universal Service Report and Order*").

18 *Id.* ¶ 49. The Commission embraced newer modalities in part out of recognition that more traditional means of providing service could become "obsolete or not cost effective." *Id.*

19 *Id.* ¶ 69.

technologies should be chosen by the "invisible hand" of the marketplace, not by regulatory classification.

B. The FCC Lacks Authority To Depart From Statutory Definitions.

While Sprint supports the *NPRM*'s goal to minimize regulation, the Commission must do so within the framework Congress has mandated. Misclassifying VoIP as "information services" will only serve to prolong the legal uncertainties currently surrounding VoIP. The Commission's ability to classify services is significantly restrained by the Act. The *NPRM* recites the relevant definitions established by the 1996 Act but also asserts that the policy implications of one category or another is a relevant decision tool. The terminology used by Congress is not wholly unambiguous and does require some interpretation by the Commission. To this extent, the policy ramifications of resolving the ambiguities are quite important. Nonetheless, the relevant definitions place real and significant limitations on the Commission's discretionary authority, as discussed below.

The FCC no longer enjoys the same degree of freedom it had prior to 1996. The terms "enhanced" and "basic" services were created by the Commission.[20] Because the *Computer Inquiries* were an administrative construct, the task of interpreting, clarifying and even

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[20] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, ¶ 93 (1980) ("*Computer II Order*") ("A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information."); *Id.* ¶ 96 ("In offering a basic transmission service . . . a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."); *Id.* ¶ 97 (an enhanced service "is any offering over the telecommunications network which is more than a basic transmission service . . . [including] computer processing applications [that] are used to act on the content, code, protocol, and other aspects of the subscriber's information . . . subscriber interaction with stored information . . . [and] voice or data storage and retrieval applications . . . .").

modifying the classifications was once within the sole discretion of the Commission subject only to the broader jurisdictional limits on its authority.[21] In 1996, however, Congress legislated its own definitions, *i.e.*, "information service"[22] and "telecommunications"[23] and "telecommunications service."[24]

There is no question that these terms derived largely from the *Computer Inquiry* framework. Nevertheless, once these concepts became statutory mandates, the Commission's earlier flexibility to move services between categories dissipated. As a result, the Commission no longer has broad reign to re-classify basic (or adjunct to basic) services as information services. Thus, the Commission no longer has the ability on utilitarian grounds to reclassify all or a portion of basic services as information services where such services are within the four corners of Congress' definition of "telecommunications services."

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21 *See, e.g.*, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order, 84 FCC 2d 50, ¶ 112 (1980) ("*Computer II Recon. Order*") ("even if we shift somewhat the boundary between Title II regulated services and other services . . . we have acted within our discretion as an administrative agency.").

22 47 U.S.C. § 153(20) ("the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."). The term also derived from the 1982 AT&T consent decree.

23 47 U.S.C. § 153(43) ("the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.").

24 47 U.S.C. § 153(46) ("the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

Sprint believes that VoIP services within the statutory definition should be classified as telecommunications services. Of course, the classification of VoIP as telecommunications by no means results in full Title II regulation. To say that all fixed voice services are subject to the same regulatory framework is not to urge that the full panoply of Title II regulatory proscriptions attach. The FCC has consistently applied, or declined to apply, traditional Title II regulation in accordance with the need for such regulation.

Although the FCC's authority to forbear was earlier subject to debate, the 1996 Act empowers the agency with the ability to decide whether to regulate telecommunications services, and further, instructs the agency as to how such discretion must be exercised. Section 10 establishes clear standards for the FCC in forbearing from regulation. Sprint believes that these standards are met here with respect to most of the traditional apparatus designed to address market power. *See* discussion at II, *supra*.

The statute presents no loophole through which VoIP may slip into the category of "information services." As a technical matter, VoIP services that are readily substitutable with POTS may or may not involve net protocol conversion. To the extent they do not, there is no ambiguity: they are "telecommunications" and/or "telecommunications services." Where some protocol conversion occurs, the definitions do not literally address their treatment.[25] But there are very clear indications elsewhere in the Act that all functionally equivalent telephone services

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[25] The term "information service" in contradistinction to the FCC's term "enhanced service" does not expressly include protocol conversion. In the *Non-Accounting Safeguards Order*, the FCC ruled that this difference in definitions did not translate into a radical revamping of the service categories and that code and protocol conversion would remain outside of Title II. This ruling did not in any way disturb the regulatory treatment of adjunct to basic or other services that "are clearly 'basic' in purpose and use." *See* discussion at text following this footnote.

are to be treated alike. Indeed, the term "telecommunications services" itself is defined by the nature of the service "*regardless of the facilities used*."[26]

One need only consider the fact that wireless calls involve a net change in protocol. First, all carriers use TDM (Time Division Multiplexing) to connect to other networks. Second, the various technologies used by industry, *i.e.*, CDMA (Code Division Multiple Access), TDMA (Time Division Multiple Access) and GSM (Global System for Mobile Communications), necessarily require net protocol conversions for most calls that originate on one carrier's network and terminate on another. Yet, the FCC has not found that wireless voice calls are information services under the Act.[27] This is not surprising, as it has always been understood that protocol conversions that are performed for purposes of managing the network, such as internetworking or enabling the introduction of new network technologies, are not new offerings to customers. Rather, they facilitate the provision of the basic service itself.[28]

The 1996 Act also amended the earlier definition of "telephone exchange service." That term is highly relevant because the Commission has recognized that telephone exchange service is a subset of telecommunications services.[29] The FCC has held, as a matter of statutory

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26 47 U.S.C. § 153(46) (emphasis supplied).

27 Indeed, if VoIP is determined here to be an information service based upon protocol conversion, then there are clear implications for CMRS as well.

28 *See Amendment to Section 64.802 of the Commission's Rules*, Report and Order, 2 FCC Rcd 3072, ¶¶ 69-70 (1987). In contrast, net protocol conversions that are offered as the primary service, such as the historical "value added network" offerings of Telenet and Tymnet at the time of the *Computer Inquiries*, have been treated as an information service. Similarly, numerous other services and features offered by CMRS providers are information services.

29 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd 15499, ¶ 270 ("*Local Competition Order*")

interpretation, that a carrier need not provide a circuit-switched service in order to meet the definition of a telephone exchange service.[30] Under the Communications Act, telephone exchange service is defined as follows:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[31]

Relying on the Universal Service Report, the FCC noted that "section 3(47)(B) was added to ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional means"[32] of communicating information within a local area:

(stating that the "term 'telecommunications service' by definition includes a broader range of services than the terms 'telephone exchange service and exchange access'"). *See also Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma*, Memorandum Opinion and Order, 12 FCC Rcd 8685, n.64 (1997) (relying on the *Local Competition Order* discussion in ¶ 270 for the proposition that a "'telephone exchange service' is a type of 'telecommunications service'").

30 *Advanced Services Order on Remand* ¶ 20. In *WorldCom, Inc. v. FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001), the D.C. Circuit overturned the FCC's conclusion in the *Advanced Services Order on Remand* that DSL services are either telephone exchange service or exchange access service depending on where that traffic "terminates" for purposes of determining the jurisdiction (interstate or intrastate) of the traffic. The court did not address the part of the FCC's reasoning in the *Advanced Services Order on Remand* discussed herein.

31 47 U.S.C. § 153(47).

32 *Advanced Services Order on Remand* ¶ 17.

> It appears from the legislative text that Congress' redefinition of "telephone exchange service" was intended to include in that term not only the provision of traditional local exchange service (via facilities ownership or resale), but also the provision of alternative local loops for telecommunications services, separate from the public switched telephone network, in a manner "comparable" to the provision of local loops by a traditional local telephone exchange carrier.[33]

The importance of functional equivalence over modality is evident elsewhere in the Act. *See* Section 214(e)(1) (the designation of "eligible telecommunications carriers" for purpose of distributing universal service funds has included wireless providers).[34]

Further, because Congress intended to adopt the general framework of the *Computer Inquiries*, there is little doubt that voice services over different technologies were treated as "basic" prior to 1996 and remain subject to regulation as "telecommunications" and "telecommunications services." The fundamental policy of the *Computer Inquiry* structure, and along with it Congress' adoption of that policy, is to retain appropriate regulation over essential consumer services while not regulating value-added services. Voice services, however they may be provided, remain the essential communications service. The *Second Computer Inquiry Final Decision* itself expressly stated its intent to treat as basic "real-time human-to-human oral conversation" irrespective of whether some processing might be involved.[35]

The *Computer Inquiry* regime has long recognized a category of services that "might indeed fall within possible literal readings of our definition of an enhanced service, but which are

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33 *Universal Service Report to Congress* ¶ 17 & n.44.

34 *See, e.g.*, *Federal State Joint Board on Universal Service, Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, 19 FCC Rcd 1563 (2004).

35 *Computer II Order* ¶ 98.

clearly 'basic' in purpose and use."[36] These "adjunct-to-basic" services are classified as telecommunications services.[37] "They facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service." *Id.* VoIP services have been refined and modified in the last two years, quite successfully, with precisely this goal: to achieve functionality and quality so as not to "alter[] the fundamental character of … telephone service." *Id.*

The proper, legally sustainable classification of VoIP as telecommunications services will provide a much needed reliable policy framework. It will permit investors, managers and consumers to make choices based on economic judgments rather than opportunities for regulatory arbitrage. This stability requires correct classification and prompt exercise of Section 10 forbearance authority. As the Court of Appeals has admonished, the FCC is without authority to circumvent the discipline of Section 10 by simply redefining statutory terms. In *ASCENT II*,[38] the court ruled that the FCC cannot circumvent the limitations on forbearance authority set forth in Section 10 through strained interpretations of other statutory provisions.

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36 *North American Telecommunications Association Petition For Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 FCC 2d 349, ¶ 24 (1985).

37 *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 as amended,* First Report and Order and FNPRM, 11 FCC Rcd 21905, ¶ 107 (1996).

38 *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

IV. THE APPROPRIATE REGULATORY FRAMEWORK FOR VoIP IS THE FRAMEWORK FOR ALL VOICE CALLS.

For consumers, fixed voice calls provided via IP platforms are no different than voice calls being provided over the PSTN. In each case, there is nothing inherently different about the specific service being provided to consumers. Consumers are receiving real time voice services. As previously discussed, these offerings in general need not and should not be subject to traditional regulatory mechanisms designed to curb market power unless, of course, such power exists. At the same time, voice calls provided via IP platforms should be subject to the same rights, obligations and requirements as fixed voice services provided via other technologies.

A. VoIP Service Providers Must Be Assured of Interconnection Rights, Access to UNEs and Access to Telephone Numbers.

VoIP providers must have interconnection rights, access to UNEs and access to telephone numbers in the North American Numbering Plan. These are fundamental policies under the 1996 Act, but the *NPRM* is remarkably silent on these issues.

Interconnection rights pursuant to Section 251(c) will be as important for VoIP services as they are for conventional CLEC services. Similarly, some VoIP providers will be impaired without access to UNEs. Services such as IP Centrex and IP PBX services, for example, will require access to UNE loops for the same reasons and to the same extent other packet-switched CLEC services do.

The Commission must make clear that the rights of VoIP providers are in no way inferior to those ensured for other voice service providers. Indeed, the failure to articulate such rights

would have the effect of discouraging facilities investment by competitive entrants, a consequence that this Commission has strenuously worked to avoid.[39]

Equitable and non-discriminatory access to telephone numbers must also be assured. Sprint understands that some VoIP providers are attempting to compensate for the lack of such access by paying carriers to order telephone numbers for their service. This arrangement, creating an artificial "market" for the sale of numbers is not only economically inefficient, it could also interfere with the FCC's obligations to ensure equitable distribution of numbers and contributions since it has little ability to address this secondary market. Again, as full participants in the provisioning of basic voice services, VoIP providers should enjoy the same rights accorded other providers using different technologies.

B. Congress Has Designated Certain Critical Social Goals That Must Apply To VoIP Services.

The FCC must assure that its treatment of VoIP services is consistent with the societal goals articulated in the Communications Act. Premier among these is Section 254, where Congress has extended an extraordinary fiscal power to the FCC for the preservation and advancement of universal service. In Sections 255, 251(a)(2) and 256(b)(2)(B), Congress set forth provisions to ensure that telecommunications services and equipment would be made available for consumers with disabilities and that the planning of telecommunications networks would promote access to these networks by consumers with disabilities. Finally, in Section 251(e)(3), Congress established "911" as the emergency number for all consumers to use in

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39 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and FNPRM, 18 FCC Rcd 16978 (2003).

emergencies on wireline or wireless phones.[40] These provisions cannot be implemented and their goals cannot be realized unless applied to all modalities of voice service, including VoIP. The *NPRM* contemplates the possibility of significant shifts of TDM traffic to IP traffic. Unless VoIP is made subject to these critical requirements, the objectives of universal service to all consumers, including the disabled, and public safety would be thwarted as the number of consumers using VoIP increases.

1. Universal Service Cannot Be Universal If Its Implementation is Selective.

Section 1 of the Communications Act sets forth the most fundamental purpose of this agency's enabling statute: "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nation-wide and worldwide wire and communications service with adequate facilities at reasonable charges…." 47 U.S.C. §151. In Section 254, Congress more specifically directed the FCC to promulgate rules that will promote, *inter alia*, (1) quality services at just, reasonable and affordable rates; (2) access to advanced telecommunications and information services in all regions of the U.S.; and (3) reasonably comparable services and rates for telecommunications and information services in rural, insular and high cost areas. *See* 47 U.S.C. § 254(b)(1)-(3). Three significant policy decisions lie behind this. First, as evident from the language of the statute itself, Congress has deemed it important for our society -- and all members of our society -- to have access to basic communications services. Second, Congress recognized that regulatory policy must keep pace with technology: "Universal service is an evolving level of telecommunications services that the Commission shall establish periodically

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40 *Wireless Communications and Public Safety Act of 1999*, Pub. L. No. 106-81 § 3, 113 Stat. 1286 (codified in part at 47 U.S.C. § 251(e)(3)).

under this section, taking into account advances in telecommunications and information technologies and services." *Id.* § 254(c)(1).

Third, Congress expressed a clear view that the responsibilities for maintaining universal service be equitably distributed among service providers. It directed that "all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." *Id.* § 254(b)(4). In addition, the FCC may require any other provider of interstate telecommunications to contribute to universal service.[41] In its implementation of Section 254, the FCC echoed Congress' directive[42] and determined that all telecommunications carriers providing interstate telecommunications services must contribute to universal service. A variety of services and modalities have thus been called upon to contribute, including:

> cellular telephone and paging services; mobile radio services; operator services; PCS; access to interexchange service; special access; wide area telephone service (WATS); toll-free services; 900 services; MTS; private line; telex; telegraph; video services; satellite services; and resale services.[43]

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41 Section 254(d) states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires."

42 *Universal Service Report and Order* ¶ 21. The FCC also stated that "universal service will be sustainable in a competitive environment; this means both that the system of support must be competitively neutral and permanent, and that all support must be targeted as well as portable among telecommunications carriers." *Id.* ¶ 19.

43 *Id.* ¶ 780. Notably, the FCC also agreed with the Joint Board that "packet switched" services can qualify as interstate telecommunications; however, the FCC removed it from the list of example interstate services that should support universal service because it described "how information is transmitted rather than defining a particular service that would be ordered by a customer." *Id.*

In requiring this support of universal service by telecommunications carriers offering a variety of services, the Commission also identified an economic basis for the requirement, *i.e.*, network externalities. "[I]ncreasing the number of people connected to the telecommunications network makes the network more valuable to all of its users by increasing its usefulness to them."[44] Thus, those entities that support universal service will also gain from its development.

Packetized voice is an advance "in telecommunications and information technologies" of the sort that Congress has mandated the Commission to consider in facilitating universal service. Excluding VoIP from such consideration would violate this directive as well as the legislative mandate for equitable distribution of the universal support responsibilities. Further, because VoIP utilizes and accesses national networks by offering interconnectivity with all telephone subscribers, it plainly benefits from access to those networks.

The consequences of excluding VoIP from universal service are potentially disastrous. If indeed VoIP is as successful as some have suggested, it will displace much of traditional circuit switched voice. The residual contributors and their customers will simply not support the universal service revenue requirements. Plainly this is a result that is legally, socially and politically unacceptable, nor is it competitively equitable. Moreover, even if VoIP providers are included with the universal service regime, continuous change in the telecommunications markets will require continued efforts by the FCC to reform and improve the system.

For many of the same reasons, VoIP providers that can meet the eligibility criteria pursuant Section 214(e) should be able to receive universal service support. Again, there is no sound basis for treating these services differently.

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44 *Id.* ¶ 8.

2. Consumers With Disabilities Should Be Able To Access VoIP Services.

In its *Disability Access Order* implementing Sections 255 and 251(a)(2), the FCC observed:

> Congress has recognized that, although we are moving into the information age with increasing dependence on telecommunications tools, people with disabilities remain unable to access many products and services that are vital to full participation in our society. The purpose of sections 255 and 251(a)(2) of the Act is to amend this situation by bringing the benefits of the telecommunications revolution to all Americans, including those who face accessibility barriers to telecommunications products and services.[45]

The significance of accessibility to telecommunications networks by disabled consumers rests upon, *inter alia*, the importance of telecommunications in the functions of everyday life, including employment,[46] the substantial number of Americans with disabilities, and the anticipated increase of Americans with disabilities as the population ages.[47] Providers of telecommunications services are required to ensure that their services are accessible to and usable by individuals with disabilities.[48]

It is, then, national policy to remedy the limited access to communications once experienced by disabled consumers and to ensure against future possible gaps. Advancements

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45 *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 1 (1999) ("*Access to Telecommunications by Disable Consumers Order*").

46 *Id.* ¶¶ 4-5.

47 *Id.* ¶ 2.

48 *Id.* ¶ 16. There is an exception to the extent that a provider can show that providing such access is not "readily achievable." *Id.* Each technology faces different challenges in providing these valuable services to the disabled and must be assessed on a case by case basis.

available to the non-disabled world post-1996 cannot be ignored in pursuing this goal. Indeed, IP-based platforms may facilitate productive and more efficient services to the disabled.[49] Sprint thus supports the *NPRM*'s identification of support for access for the disabled as another critical component of VoIP regulation.

3. Consumers Must Be Able To Rely On E911/911 When Using VoIP Services.

Section 151 of the Act sets forth among its purposes "promoting safety of life and property…." In the *Wireless Communications and Public Safety Act of 1999*,[50] Congress found that an "end-to-end communications infrastructure among members of the public" and public safety officials was crucial in saving lives, reducing the severity of injuries, and reducing costs related to health care.[51] In addition, Congress recognized that "emerging technologies can be a critical component of the end-to-end communication infrastructure connecting the public" with public safety officials.[52] Consequently, Congress articulated a national policy to "encourage and facilitate the prompt deployment of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs."[53]

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49 Suzanne Robitaille, *How VoIP Can Connect the Disabled*, Business Week Online, Apr. 28, 2004 (registration required).

50 Pub. L. No. 106-81, 113 Stat. 1286 (codified at 47 U.S.C. §§ 222, 251(e)).

51 47 U.S.C. § 615, Historical and Statutory Notes, Findings and Purpose (a)(1); Pub. L. No. 106-81 § 2(a)(1).

52 47 U.S.C. § 615, Historical and Statutory Notes, Findings and Purpose (b); Pub. L. No. 106-81 § 2(b).

53 47 U.S.C. § 615, Historical and Statutory Notes, Findings and Purpose (a)(3); Pub. L. No. 106-81 § 2(a)(3).

VoIP customers must also be able to connect to their public safety officials via E911/911. Most importantly, consumers have come to rely upon the use of 911 for emergencies. While the level of 911 services that can be made available to consumers will vary with the technology used, consumers will expect at a minimum basic connectivity to emergency service providers. The consequence of not having E911/911 connectivity can mean inferior access to critical services including fire, police and ambulatory services in emergency situations. It also defeats the "seamless" and "reliable" "comprehensive coverage" which Congress has encouraged. Certainly, where it already is technically feasible to offer such connectivity, VoIP providers should be required to provide it.

C. The FCC's Current Access Regime And Its Subsequent Reforms Should Apply To All Voice Services.

The current regulatory regime requires that providers of interexchange services pay for access when their calls originate or terminate on another provider's facilities.[54] VoIP services impose costs when they utilize other companies' networks. When a carrier's facilities are being used by another provider, they should be compensated for such use, as currently required by the FCC's regulatory regime. Artificially promulgating regulatory cost disadvantages for some competitors is simply bad policy. Therefore, if a VoIP provider is using the facilities of another network provider to originate or terminate traffic, it should be required to compensate that carrier under the current regime. Similarly, a facilities-based VoIP provider, such as a cable system offering telephony, should be able to charge and be compensated for calls carried over its local

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[54] However, an inequity remains for CMRS carriers' ability to collect access charges from interexchange carriers that use wireless networks. *See In the Matter of Sprint PCS and AT&T Corp. Petitions for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 (2002). This should be remedied in the Commission's proceeding on intercarrier compensation.

facilities. Otherwise, such VoIP providers will be unfairly disadvantaged vis-à-vis other LECs in competing for end users since they would be denied a revenue stream that is available to conventional LECs.

Of course, the FCC is reviewing its access regime. Sprint has supported this reform effort and urges the Commission to promptly address the need for a more efficient structure. These reforms can then be applied to all competitors providing voice services, including VoIP providers.

V. THE GOALS IDENTIFIED IN THE *NPRM* MAY NOT BE ATTAINED THROUGH CLASSIFICATION AS INFORMATION SERVICES.

The *NPRM* asserts that by using its Title I "ancillary" jurisdiction, the Commission can achieve the policy goals of preserving universal service and providing disabled and 911 access even if VoIP services are classified as information services. Sprint respectfully submits that this approach is fraught with doubt, and if adopted would only serve to continue the legal controversies over VoIP for years to come. First, the relevant sections of the Communications Act do not expressly provide authority to extend their respective application to information services. Second, there is considerable doubt as to whether ancillary jurisdiction is present and can be exercised. [55] The discussion below analyzes each relevant section of the Act setting forth the goals identified by the *NPRM* as relevant here.

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[55] It should be noted at the outset that the *NPRM*'s assertion that all enhanced services, and thus all information services, are subject to the Commission's jurisdiction is historically counterfactual and legally untenable. The *Second Computer Inquiry Final Decision*, on reconsideration, disavowed any broad ruling over all enhanced services and asserted jurisdiction only over enhanced services offered by common carriers. *Computer II Recon. Order* ¶ 121. Further, Congress has granted the Commission subject matter jurisdiction over "communication" and certainly not all information services are "communication" (*e.g.*, data processing). Nonetheless, VoIP is plainly communication, and as defined here, a telecommunications service.

A. Ancillary Jurisdiction Does Not Convey Residual Authority for All Matters Proximate to Communications.

It may be useful to set out the parameters of FCC jurisdiction, express and ancillary. In order to find jurisdiction in an administrative agency, a grant must be found in the governing statute. In the case of the Communications Act, a grant of authority can obtain only where there is express authority in a specific provision of the Act, or in the alternative, where the target matter is "communication by wire or radio" and where the target persons are engaged in such communications. Of course, if the first test is met, the question of ancillary jurisdiction is academic. If not, the question is whether jurisdiction can be found under Title I. VoIP is undoubtedly "communication by wire or radio" under Section 2(a) of the Act and thus falls within the FCC's subject matter jurisdiction. But this jurisdiction can be exercised only when the regulation is "reasonably ancillary" to the effective performance of its responsibilities elsewhere in the Act,[56] or to the promotion of explicit goals set forth elsewhere in the Act. [57]

Where Congress has made a decision to withhold authority to regulate, the concept of ancillary jurisdiction is unavailing. Ancillary jurisdiction cannot be used to override constraints placed upon agency action. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*") (reversing FCC rules requiring cable systems to make available channels for public, education, government and commercial leased access as inconsistent with Congressional admonition to not treat broadcasters like common carriers).

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[56] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)(upholding FCC regulations requiring cable systems to carry local stations and restraining cable operators from importing signals from distant stations in order to protect local broadcasters).

[57] *See United States v. Midwest Video Corp*, 406 U.S. 649 (1972), *rehearing denied*, 409 U.S. 898 (1972) ("*Midwest Video I*").

In addition, ancillary jurisdiction is not a device that permits the Commission to reach beyond the personal and subject matter jurisdiction found in the statute. It is real, not "penumbral" jurisdiction. However, it is sometimes misunderstood (or misconstrued) to permit the assertion of jurisdiction over entities and activities that impinge upon or otherwise affect regulated enterprises or regulatory goals, *i.e.*, activities "in the neighborhood" of communications by wire or radio. That type of misunderstanding may underlie the *NPRM*'s apparent optimism that it can achieve Congress' policy objectives using Title I.[58]

B. Misclassification of VoIP Threatens the Interconnection, UNE and Telephone Number Rights of VoIP Service Providers.

Unless classified as a telecommunications service, VoIP may not be eligible for interconnection with other voice providers in accordance with one of the 1996 Act's fundamental policies. Section 251(c)(2) requires, among other things, that incumbent LECs provide interconnection "for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). To be eligible to interconnect under Section 251(c)(2), a requesting carrier must seek to exchange telephone exchange service or exchange access.[59] The FCC has also determined that information service traffic may be exchanged over a Section 251(c) interconnection facility, but only where the carrier exchanges qualifying traffic over that facility. *See Local Competition Order* ¶ 995. Access to UNEs is similarly jeopardized. The

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[58] But this optimism is unfounded. Although the FCC has asserted this view of ancillary jurisdiction in some of its decisions, it has attempted to impose regulation on this basis in only two cases: access for the disabled and video description. The first was not appealed, the latter was soundly rejected by the Court of Appeals. See discussion V.C., *infra*.

[59] *See Implementation of the Local Competition Provisions in the Telecommunications act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 184 (1996) ("*Local Competition Order*").

entities to which both interconnection and unbundled access duties run are "requesting telecommunications carrier[s]." 47 U.S.C. §§ 251(c)(2),(3).

Additionally, VoIP providers currently have no rights to North American Numbering Plan numbers if they are deemed to be providing an information service. Only licensed or certified carriers may apply to NANPA for telephone numbers. *See Numbering Resource Optimization*, Report and Order and FNPRM, 15 FCC Rcd 7574, ¶¶ 96-97 (2000).

The choice of classification as an information service, then, carries significant downside risks for executing the policies of Section 251(c) and Section 251(e). Reasoned decisionmaking must take account of this substantial cost of misclassifying VoIP services as information services.

C. Section 254 May Foreclose Extending Its Requirements to Information Services.

Section 254(d) states that every "telecommunications carrier that provides telecommunications services" must contribute to universal service. That section further provides the FCC with the authority to exempt those carriers under specified conditions. The last sentence of the section authorizes the Commission to expand the class of contributors to "any other provider of telecommunications" to support the fund. There is no grant of authority to broaden the class of contributors beyond this, however, and thus it appears that information service providers (among others) are outside the express language of the statute.

Simply as a matter of statutory construction, there is reason to believe that no additional authority can or should be inferred from the statute. By specifying the FCC's authority to extend contribution requirements to private carriers, Congress likely intended to foreclose the agency from extending contribution requirements to others, including providers of information

services.[60] Such an interpretation is supported by the well-known canon of construction *expressio unius exclusio alterius est*, the "expression or inclusion of one thing is the exclusion of others."[61]

The context of the 1996 Act suggests this construction as well. Information services are recognized in the Communications Act, but are regulated only in very discrete, narrow areas. Congress in fact expressed its intent not to have such services regulated.[62] In codifying the *Computer Inquiry* framework, Congress endorsed the decision to hold information services safe from regulation.[63] At the same time that Congress codified the definition of "information

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60 This interpretation is supported by the legislative history of the Telecommunications Act of 1996. The 1995 Senate Report of the Committee on Commerce, Science, and Transportation explains that the FCC or a State may "require any other telecommunications provider, such as private telecommunications providers, to contribute to the preservation and advancement of universal service." S. Rep. No. 104-23, 28 (1995). But in the case of information services, the Report explained that the legislation "does not require providers of information services to contribute to universal service." *Id.*

61 Norman J. Singer, 2A *Statutes and Statutory Construction* § 47:01 (6th ed. 2000 rev.) (*hereinafter* "Singer") (citations omitted).

62 47 U.S.C. §230(b)(2).

63 *Universal Service Report to Congress* ¶ 69.

In addition, Section 509 of the 1996 Act may apply. That section provides "good Samaritan" protection from civil liability for providers or users of an "interactive computer service" for actions taken to restrict access to objectionable on-line material. To the extent that at least some VoIP services may fall within the term, there is a solid argument that the FCC cannot regulate. "Interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." The section further states: "It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §§ 230(b)(2), (c)(2), (f)(2).

services" and an unregulated/deregulated policy for information services, it adopted regulatory requirements in Title II for universal service. This context suggests that the omission of "information services" from the list of potential contributors was a deliberate choice to circumscribe the scope of Section 254.[64]

As noted earlier, where Congress has made a decision to withhold authority to regulate, no ancillary jurisdiction can be found. *See, e.g., Midwest Video II*. This is the precise analysis used by the D.C. Circuit in striking the FCC's video description rules. *MPAA v. FCC*, 309 F.3d 796 (D.C.Cir. 2002).[65] Those rules would have required video programmers to make accessible an aural description of key visual elements in the program, in the words of the court, "a second script."[66] The court stated that the rules in question involved regulation of program content, an area (like information services) in which Congress has given the FCC only very narrowly circumscribed authority. The court found that nothing in the language of Sections 151 or 152 could be read to authorize regulation of program content. Although the decision relied heavily upon the First Amendment implications of program content, its logic is applicable here.

In rejecting the Commission's arguments that its rules were clearly "in the public interest," the court reasoned: "The FCC cannot act in the 'public interest' if the agency does not

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64 *Compare* 47 U.S.C. § 254(c)(3), which grants the Commission discretion to determining the services to schools and libraries that can be supported by federal universal service support mechanisms.

65 *MPAA* also represents the most recent iteration by the court of the significance of 4(i) and 303(r). Neither provision acts as a stand-alone grant of jurisdiction. 309 F.3d at 806.

66 *Id.* at 803. The court first established that the Commission's announcement of ancillary jurisdiction was entitled to no deference because, "the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." *Id.* at 801 (emphasis in original) (citations omitted).

otherwise have the authority to promulgate the regulations at issue." *Id*. at 806. Similarly, Section 214(e) makes clear that a firm must be a "common carrier" to be considered eligible to receive universal support. VoIP services that are functionally equivalent to traditional services in quality and scope of service should be able to receive universal service funds where they meet all other eligibility requirements. Sprint fully agrees that universal service is a valuable public interest goal, but the most secure route to promoting it is to declare VoIP a telecommunications service.

D. The Requirements of Sections 225 and 255 Cannot Be Extended to Information Services Providers.

Access for disabled persons is governed by Sections 225 and 255. The analysis below indicates that the FCC cannot fulfill its obligation to promote these values if VoIP services are classified as "information services."

Section 255. The requirement in Section 255 that services be made available to persons with disabilities applies only to (1) manufacturers of telecommunications equipment or CPE; and (2) a provider of telecommunications services, with respect to that service. 47 U.S.C. §255(b)-(c). By specifying which entities and providers must comply, Congress intended that only those firms must comply with the section. Here, too, the canon of statutory construction, *expressio unius exclusio alterius est*, indicates that Congress' inclusion of manufacturers and common carriers is also the exclusion of other service providers, including information services.[67]

In its order in the Section 255 proceeding, however, the Commission asserted that voicemail and interactive menu services (and "related equipment that perform[s] these functions") "are at the very least 'incidental' to the 'receipt, forwarding and delivery of

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[67] *See* Singer, *supra* n.61, § 47:01.

communications,'" and therefore fall within the scope of the Commission's subject matter jurisdiction over interstate "communication by wire and radio." *Access to Telecommunications by Disabled Consumers Order* ¶ 97. Further, voicemail and interactive menu services "are not less 'incidental' to the 'receipt, forwarding, and delivery of communications' because the services may be provided by non-carriers in some instances." *Id.* ¶ 98. In asserting *in personam* jurisdiction over all providers of services and products "incidental to" communications, the decision declared an extraordinarily expansive view of FCC jurisdiction. Under its logic, the Order could include within its jurisdiction all telecommunications equipment manufacturers, copper mines, cable-laying plows, etc. It is important to note that the Commission's view of its ancillary jurisdiction in the Section 255 order was never subject to judicial scrutiny. Sprint respectfully submits that its faulty analysis not be extended here.

Ancillary jurisdiction cannot be found on the basis of proximity to activities specifically identified in Title I. As a creature of Congress, the FCC has only that jurisdiction which Congress has delegated to it. Indeed, a loosely bounded grant could constitute an unconstitutional delegation of Congress' authority. Again, the public value of furthering access for the disabled cannot be questioned, but the "FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *MPAA,* 309 F.3d at 806.

Section 225. Section 225 requires that "[e]ach common carrier providing telephone voice transmission service" also provide "telecommunications relay service" in compliance with FCC regulations. The *NPRM*'s analysis raises questions regarding the types of services that might fall within the concept of relay services. It observes that IP-based services providing hearing or speech impaired persons with functional equivalents of traditional telecommunications services

also qualify as TRS, and thus are supported under this section.[68] Sprint has supported this ruling. Newer technologies can offer more efficient ways of providing TRS, and given the use of the term "telephone transmission services" along with the broad "functional equivalent to voice" standard in the definition of TRS, the FCC has considerable room to allow carriers to receive support for the provision of these services.

The *NPRM*, however, fails to address the more relevant issue for this proceeding. The statutory obligation to provide TRS is imposed exclusively upon "common carriers" providing "telephone transmission services." 47 U.S.C § 225(c). It seems unlikely that VoIP providers, if classified as vendors of information services, can be required to support this important aspect of universal service.[69]

E. Jurisdiction To Compel The Provision of 911/E911 Service By "Information Service" Providers Is Highly Dubious.

There is no specific grant of authority in the Communications Act that explicitly authorizes the FCC to require carrier or non-carrier provisioning of 911 services. In fact, since its inception, wireline E911[70] has almost exclusively been a matter for states and localities and

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68 *See Provision of Improved Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, *Petition for Clarification of WorldCom, Inc.*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, ¶ 46 (2002).

69 *See* Singer, *supra* n. 61, § 47:01.

70 E911 shortens the response times in emergencies by using a caller's ANI to route an emergency call to the PSAP nearest the caller's location. Depending on the level of service the LEC has deployed, a PSAP not only receives the ANI of the caller, but it receives the caller's location and other information as well. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Notice of Proposed Rulemaking, 9 FCC Rcd 6170, ¶ 6 (1994) ("*E911 NPRM*"); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911*

the LECs that served them.[71] 911 began in 1965 as the Bell System made the digits "911" nationally available for emergency purposes.[72] As it has evolved from a simple abbreviated dialing arrangement to expedite calls to emergency responders to the enhanced service known today, wireline 911 service has been almost exclusively regulated by states and localities.[73] In fact, the essentially local, intrastate nature of wireline 911 puts into question whether the FCC has authority over it.[74]

In 1999, Congress passed the *Wireless Communications and Public Safety Act of 1999*.[75] Although primarily directed to wireless E911, the 911 Act, *inter alia*, amended Section 251(e) to

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Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, ¶¶ 3-5 (1996).

Sprint refers to both 911 and E911 here collectively as 911 service.

71 In contrast, wireless 911 services are exclusively governed at the federal level, with the states entirely preempted by Congress and the FCC.

72 *E911 NPRM* ¶ 6.

73 *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, *et al.*, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576, ¶ 2 (2002).

74 Section 2(b), 47 U.S.C. §152(b). The equipment used to provide 911 service to PSAPs was at one time subject to state tariff requirements. The FCC's deregulation of all CPE nevertheless allowed each state to decide whether 911 equipment should in fact be detariffed. *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry); Southwestern Bell Telephone Company Petitions to Detariff and Transfer to Southwestern Bell Telecommunications, Inc., Certain Embedded Customer Premises Equipment*, Eighth Report and Order, 3 FCC Rcd 477, ¶ 16 (1988).

75 Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286 ("911 Act"). *See Implementation of 911 Act; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Fourth Report and Order and Third Notice of Proposed Rulemaking, 15 FCC Rcd 17079, ¶ 1 (2000) ("*911 Act Implementation Order*").

require the FCC to make 911 the "Universal Emergency Telephone Number" apply to "both wireline and wireless telephone service." 911 Act § 3(a). The 911 Act also directs the Commission to encourage and support the States in developing comprehensive communications throughout the United States so that all jurisdictions offer seamless networks for prompt emergency service.[76] But the 911 Act made clear that this latter provision could not be construed to either authorize or require the FCC "to impose obligations or costs on any person."[77]

As the Commission later explained, the 911 Act only authorized the Commission to "adopt provisions that facilitate the States' efforts through guidelines, fact sheets, meetings, or other information-sharing measures that do not impose obligations or costs or otherwise interfere with the careful balance of responsibilities."[78] In other words, nothing in the 911 Act expanded the FCC's authority (if any) to regulate 911 other than to designate 911 as the national number, and the Commission's implementing orders recognize that.

Notwithstanding this history, in December 2003 the Commission relied heavily upon the 911 Act to conclude that it has "jurisdiction to adopt 911 rules for both wire and radio communications,"[79] although it issued no wireline E911 rules at the time. The *E911 Expansion Order* imposed E911 obligations on MSS operators, telematics, wireless resellers and prepaid

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76 911 Act, § 3(b), 47 U.S.C. § 615.

77 *Id.*

78 *911 Act Implementation Order* ¶ 24; *Implementation of 911 Act; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Fifth Report and Order; *et al.*, 16 FCC Rcd 22264, ¶ 49 (2001) (discussing its role in supporting and encouraging state efforts to deploy 911).

79 *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340, ¶ 13 (2003) ("*E911 Expansion Order*").

calling, but declined to impose federal regulations on multi-line telephone systems, like PBXs (leaving such decisions to state-by-state determinations). The Commission's jurisdictional claim was loosely based upon ancillary jurisdiction grounds, as it found that (1) Section 1 gives it authority to regulate wire and radio communication to promote safety of life and property; (2) the congressional findings in the 911 Act conclude that improved public safety substantially promotes interstate and foreign commerce (presumably intending to permit the Commission to declare E911 an interstate issue); and (3) section 4(i) gives it the authority to adopt rules as necessary to fulfill its statutory obligations.

The *NPRM* suggests that extending 911/E911 requirements to VoIP services may not be necessary or efficient. It notes that voluntary industry initiatives are already underway. But these observations, of course, apply equally to services classified as "telecommunications services." Sound policy requires that the agency not impose burdens on some but not others without sound justification, such as market power or technical limitations. If VoIP is declared to be an information service, the legal difficulties of asserting jurisdiction ("ancillary to ancillary jurisdiction"!) defeat the goal of neutrality.

F. Other Title II Requirements Are Directed to Common Carriers.

The *NPRM* also requests comments on the applicability and utility of certain consumer protection and privacy provisions set forth in Title II. However, the application of each of the relevant requirements hinges upon a common carrier making a telecommunications service offering. *See* Section 258 (slamming prohibition and liability addressed to "telecommunications carrier"); Section 222 (imposing privacy protection obligations upon "[e]very telecommunications carrier"); *Truth-in-Billing and Billing Format*, First Report and Order and FNPRM, 14 FCC Rcd 7492 (1999) (truth-in billing rules apply to carriers).

Ancillary jurisdiction very likely does not attach here. The Commission's regulatory actions under Title I to advance certain specified policy goals stated elsewhere in the Act must be undertaken in ways that are consistent with those other provisions and policies. In *Midwest Video II*,[80] the Supreme Court found that the Commission had exceeded the limits of its ancillary jurisdiction by imposing common carrier obligations on cable services.[81] The Court observed that then-section 3(h) directly prohibited the Commission from treating broadcasters as common carriers, and that the FCC's regulation of cable television had been exercised and upheld as ancillary to its regulatory responsibilities over broadcasting. The Court reasoned that "without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded."[82] Congress had not delegated to the Commission "unrestrained authority."[83]

The Court did not question the Commission's conclusion that the imposition of these obligations would advance the Title III policy objectives of increasing outlets for local self-expression and augmenting the public's choice of programs. But it held that the Commission could not advance those goals in a manner that would be prohibited if applied directly to broadcasters subject to the Commission's authority under Title III.

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80 *See Midwest Video II* (reversing FCC rules requiring cable systems to make available channels for public, education, government and commercial leased access).

81 *Id.* at 695-96.

82 *Id.* at 706 (citations omitted).

83 *Id. See NARUC v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (ancillary jurisdiction "is really incidental to, and contingent upon, specifically delegated powers under the Act. * * * [E]ach and every assertion of jurisdiction . . . must be independently justified as reasonably ancillary to the Commission's power over broadcasting.").

Similarly, in *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), the court held that the restrictions placed on the Commission's authority over intrastate carrier activities pursuant to Section 152(b) apply equally to the exercise of authority under Title II and to the exercise of authority ancillary to Title II: "The system of dual regulation established by Congress cannot be evaded by the talismanic invocation of the Commission's Title I authority." *Id.* at 1240 n.35.

The Commission faces a directly analogous limitation on the exercise of its ancillary authority in the case of VoIP when it purports to exercise authority in furtherance of Title II goals. Specifically, the use of the term "common carrier" in the Title II sections cannot be overlooked. The statutory definition of "telecommunications carrier" states that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44). Thus, obligations imposed upon common carriers cannot be extended to activities that are not telecommunications services. As noted earlier, telecommunications services are distinct from information services, and in fact, may be mutually exclusive.[84]

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[84] *See Universal Service Report to Congress* ¶ 39 (1998) ; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934 as amended,* Order on Remand, 16 FCC Rcd 9751, 9755 ¶ 9 (2001); *Universal Service Report and Order* ¶¶ 788-90 (stating that information services are not inherently telecommunications services simply because they are offered via telecommunications). The mutual exclusivity of these terms is a distinct question of whether unbundling of the services is or should be required. *Cf. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

G. Access Charges May Be Imposed.

The access charge regime, including any reform now underway, is designed by the FCC to permit companies to be compensated for costs imposed by users of their network facilities. Access charges may be assessed upon either carriers or end users.[85]

The FCC has exempted certain end users from paying switched access charges imposed upon interconnecting carriers. Notwithstanding recognition that information service providers may impose nearly identical costs upon local carriers that long distance providers do, the ISP exemption has held firm. In the case of VoIP as an information service, using third party local facilities to originate and terminate traffic, the costs imposed are indeed identical because their use of such facilities is indistinguishable from that of traditional voice providers.

Because these costs are real, they should be recovered from the third parties that cause them. Thus, all facilities-based providers whose networks are utilized should be compensated in the same way, including wireless carriers. Again, once intercarrier compensation reform is complete, that framework should also apply on a competitively neutral basis.

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85 *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 67-68 (1997).

VI. CONCLUSION

Sprint respectfully requests that the Commission promptly adopt its VoIP policies consistent with its comments made herein.

Respectfully submitted,

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